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82-410

IN THE

Supreme Court of the United States

October Term, 1982

No._____

CHARLES WILSON CAWTHON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO ORDER A NEW TRIAL BASED UPON THE TRIAL COURT'S ABUSE OF DISCRETION BY FAILING TO GRANT REPEATED REQUESTS FOR A SEPARATE TRIAL FROM THE TRIAL OF THE CO-DEFENDANT WHEN THE CO-DEFENDANT'S DEFENSE WAS ANTAGONISTIC AND IRRECONCILABLE WITH THAT OF THE PETITIONER'S, TO WIT: THE CO-DEFENDANT RELIED UPON THE DEFENSE OF ENTRAPMENT, THE GOVERNMENT INTRODUCED EVIDENCE OF A SEPARATE CRIME TO PROVE THE CO-DEFENDANT'S PREDISPOSITION, THE CO-DEFENDANT TOOK THE STAND AND EVIDENCE OF A PRIOR CONVICTION OF THE CO-DEFENDANT WAS INTRODUCED INTO EVIDENCE.

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OPINION BELOW

The Opinion of the Circuit Court of Appeals for the Eleventh Circuit is an Opinion marked DO NOT PUBLISH, which affirmed the Petitioner's conviction as charged in a two-count indictment. A copy of the Court's Opinion appears in the Appendix (A-1).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on June 3, 1982, affirming the Petitioner's conviction herein. A timely Petition for Rehearing was filed. The Court of Appeals entered its Order denying the Petition for Rehearing on July 28, 1982 Appendix (B-1). This petition is filed within sixty days of that decision and is therefore timely filed.

The Jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fundamental right to a fair trial in the United States is implicit in Article III, Section 2(3) of the United States Constitution, and the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

CHARLES WILSON CAWTHON, GEORGE SCHINDLER and JAMES VEAL, also known as "the Colonel," were charged with conspiracy to possess marijuana with the intent to distribute, in violation of 21 U.S.C. Section 846(a)(1). Cawthon alone was also indicted for possession of marijuana with intent to distribute. 21 U.S.C. Section 841(a)(1). Prior to and during the trial, Cawthon moved for a severance which was denied by the trial court. Cawthon was subsequently tried along with Schindler, as "the Colonel" did not appear for trial, and was convicted by a jury.

According to the facts as disclosed by the record, undercover detective Woodrow Hill of the Tampa Police Department negotiated with Schindler for the purchase of one pound of cocaine. When the deal fell through because of Schindler's temporary inability to procure the cocaine, Hill informed Schindler that he was interested in selling a large amount of marijuana. Relying on that proposition, Schindler procured buyers for 1,000 pounds of marijuana and, after testing samples of the drug, introduced Hill to Cawthon and explained that only 350 pounds would be purchased initially. Cawthon then gave undercover officers $99,075.00, and drove away with 365 pounds of marijuana. He was subsequently arrested and the marijuana was seized.

Prior to the commencement of the trial, Mr. Cawthon tried repeatedly to sever his case from that of his co-defendant. This effort at securing a separate trial was renewed and intensified during a conference immediately prior to the selection of the jury, the Government then informed the Trial Court of its intention to develop certain testimony from the chief Government law enforcement witness, that a cocaine conspiracy existed between the co-defendant Shindler and two other persons.

The Government recited that they desired to introduce testimony of the Cocaine Conspiracy in anticipation of the co-defendant Shindler's entrapment defense. Mr. Cawthon did not join in the co-defendant's entrapment defense. Further, the Government argued that the Cocaine Conspiracy evidence was admissible to show a continuing plan or scheme on the part of the co-defendant Shindler.

Mr. Cawthon was in no way implicated in this conspiracy; to the contrary, the evidence later showed the Cocaine Conspiracy to be an entirely separate conspiracy, involving identified persons other than Cawthon. Additionally, the Cocaine Conspiracy was structured in an entirely different manner from the crime charged against Mr. Cawthon; namely, in the Cocaine Conspiracy the illegal substance was to be *sold by* the co-defendant, Shindler, to the law enforcement officer. However, in the case being tried against Mr. Cawthon, the law enforcement agent *supplied* the illegal substance (marijuana).

The case against the co-defendant Shindler and his defense created an elaborate, unique, complex and extremely damaging situation for Mr. Cawthon. To defend himself from the crime charged, the co-defendant took the stand, put his credibility in issue, allowed himself to be cross-examined on prior convictions, raised the issue of predisposition, and faced the highly damaging circumstance of having similar fact evidence introduced against him. Mr. Cawthon was forced to withstand the prejudicial spillover and transference of guilt inherent in this type of evidence.

During Shindler's opening statement, his counsel told the jury that Shindler was going to testify and tell the jury the facts of the case.

During the trial, Schindler asserted an entrapment defense. He testified that he needed money quickly and had been unable

to resist the temptation to make the marijuana deal in light of his financial predicament. During cross examination, he admitted that he had been convicted of a felony and that Cawthon took possession of the marijuana. The government, in an effort to show background facts and to refute Schindler's claim that he was not predisposed to commit the crime, elicited testimony from Detective Hill concerning the aborted cocaine sale. Cawthon, who was not involved in the unsuccessful cocaine transaction, did not testify or introduce any evidence, but now alleges that the district court erred in refusing to grant his motion for severance.

The Trial Court gave absolutely no instructive guidance to the jury in handling the Cocaine Conspiracy, evidence, or the evidence of the co-defendant's prior conviction and imprisonment. Furthermore, the Trial Court failed to even give the standard instruction concerning separation consideration to each person on trial.

REASONS FOR GRANTING THE WRIT

Whether the Court of Appeals erred in failing to order a new trial based upon the trial court's abuse of discretion by failing to grant repeated requests for a separate trial from the trial of the co-defendant when the co-defendant's defense was antagonistic and irreconcilable with that of the Petitioner's, to wit: the co-defendant relied upon the defense of entrapment, the Government introduced evidence of a separate crime to prove the co-defendant's predisposition, the co-defendant took the stand and evidence of a prior conviction of the co-defendant was introduced into evidence.

By being tried jointly with the co-defendant, Shindler, Mr. Cawthon was denied his fundamental right to a fair trial. The Petitioner realizes that in the usual case, a separate trial is not required in order to provide a person a fair trial. Nevertheless, criminal responsibility is individual even when persons are alleged to have committed a crime together. Individuals—not groups—are arrested, charged, convicted, and sentenced. To depart from this basic fundamental principle is to depart from the principles of fairness that are generally associated with criminal trials in this country.

The position of Mr. Cawthon in this case bore no resemblance to the position of his co-defendant. Mr. Cawthon was never accused by the testimony or the Government argument with having been the source of any contraband, or having attempted or conspired to supply any contraband to the undercover Government agents. The involvement of Mr. Cawthon in the crimes charged in the Indictment was limited, not only in time, but also in responsibility. Mr. Cawthon presented no witnesses or documentary evidence on his own behalf. He relied upon attacking the Government's proof and questioning whether the Government had proven all of the essential elements of the crimes charged beyond a reasonable doubt. Mr. Cawthon did not testify at his trial.

Such was not the situation with the co-defendant. The position of Shindler in the case, the evidence presented against Shindler and the defense developed by Shindler was antagonistic and irreconcilable with the position, the evidence, and the defense of Mr. Cawthon. Considering the specific and cumulative prejudice resulting to Cawthon, the scales were tipped in favor of the Government because of the joint trial. Mr. Cawthon was subjected to the most compelling prejudice that could exist in a case of this nature because of the deeds and behavior of his co-defendant.

When the co-defendant relied upon the defense of entrapment, evidence of an unrelated crime—a Cocaine Conspiracy committed by the co-defendant and others—was admitted at the joint trial. Had Mr. Cawthon been tried separately this highly damaging testimony would have been clearly inadmissible. There was never any contention that Mr. Cawthon was involved with the Cocaine Conspiracy. So, otherwise inadmissible evidence of a separate Cocaine Conspiracy became a feature of Mr. Cawthon's trial solely because of the joint trial.

The law is firmly established and well-defined that if prejudice either to the Government or a particular defendant is shown by joinder, the Court may, in its discretion, grant the severance of defendants or provide whatever other relief justice requires. See Federal Rules of Criminal Procedure 14 and *United States v. Petersen*, 611 F.2d, 1313 (10th Cir. 1979). Motions for severance are discretionary and Mr. Cawthon recognizes that the Trial Court's decision not to sever will be overruled only if an abuse of discretion is shown. *United States v. McGuire*, 608 F.2d 1028 (5th Cir. 1979). It is the position of Mr. Cawthon that because of the unique factual setting here, the Trial Court abused its discretion in not severing his trial. The Trial Court has a duty to sever the trials of co-defendants with mutually antagonistic and irreconcilable defenses in order to preserve an individual's right to a fair trial. *United States v. Aguiar*, 610 F.2d 1296 (5th Cir. 1980).

The critical question before the reviewing Court is the ability of the jury to "compartmentalize" the evidence or give independent consideration to the cases and charges against each defendant. *United States v. Boyd*, 595 F.2d 120 (3rd Cir. 1978); *United States v. Brady*, 579 F.2d 1121 (9th Cir. 1978) Cert. Denied, 39 U.S. 1074 (1979). By this standard, the jury in the unusual factual setting of the instant case could not be expected to compartmentalize the featured Cocaine Conspiracy testimony solely against the co-defendant Shindler. This is especially true in view of the total void of special instructions by the Trial Court.

In *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), the Court recognized that when, as the trial progressed, it became clear that prejudice to a defendant at a joint trial outweighed any possible disruption in the judicial process, the Trial Court abused its discretion in not granting a severance. Further, the Court, in *Johnson*, clearly recognized that a trial court has a continuing duty at all stages of a trial to grant a severance when prejudice does appear. The continuing development of prejudice through spillover and transference of guilt that is shown by the factual setting here required that the trial judge fulfill his continuing duty to grant the severance during the progression of the trial. See also *United States v. Perez*, 489 F.2d 51 (5th Cir. 1974).

In *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979), the Court recognized that in a prosecution for conspiracy to sell and possess cocaine, where a co-defendant utilizes the defense of entrapment, the trial court must take some action to cure the prejudice of a joint trial. In *Dohm*, the trial court utilized a bifurcation summation to cure the prejudice presented there. In the instant case, no such procedure was used and, as has been pointed out, absolutely no special instructions whatsoever were given to deal with the many problems and prejudices presented by the use of entrament by a co-defendant.

In *United States v. Danzey*, 594 F.2d 905 (2nd Cir. 1979), the Court dealt with the problems presented in a joint trial when similar fact evidence as to one defendant was introduced. In reversing the conviction of the defendant, *Danzey*, the Court emphasized that similar fact evidence must be particularly scrutinized for its prejudicial spillover effect on a co-defendant. In the instant case, the Trial Court did not particularly scrutinize the similar fact evidence. Had he done so, a severance would have been granted.

The treatises and commentators are in accord that a danger of joinder is that the defendant may be prejudiced by his co-defendant's criminal record. See *McCormick's Handbook on the Law of Evidence*, Section 190, at 238 (2nd Ed. E, McCleary 1972); 37 Michigan Law Review 1327, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices.* Even though a jury is instructed about limited use to which the criminal record of a co-defendant is supposed to be used, some jurors may consider earlier convictions as evidence of the co-defendant's criminal propensities. Joinder merely exacerbates this problem with regard to a co-defendant because evidence of a co-defendant's record may reflect prejudicially on other persons at trial with him. Such is clearly the case when not only was the co-defendant Shindler's prior conviction brought out in evidence, but also his prior service of a term in prison.

Courts have recognized that antagonistic defenses may require severance, particularly if that defense admits to some or all of the elements of the charge. See *United States v. Roberts*, 583 F.2d 1173 (10th Cir. 1978); *United States v. Johnson, supra.* In the instant case, the co-defendant Shindler while testifying, did in fact admit to some of the elements of the crime charged; thus, raising the strong probabilities of prejudicial spillover and transference of guilt to Mr. Cawthon.

Because of the uniqueness presented by the prejudicial spillover and transference of guilt raised by the co-defendant's entrapment defense, and the similar fact evidence introduced to controvert that defense, this case presented unusual difficulties for a jury's consideration. The Trial Court should have taken extraordinary measures in instructing the jury as to how to weigh and use evidence presented against the co-defendant. Not only did the Trial Court fail to give such extraordinary instructions, but it also failed to respond to requests by the jury for guidance during their deliberations. In *Wright v. United States*, 102 U.S. 36, 250 F.2d 4 (1957) (en banc), the Court pointed out that when a jury shows confusion, a trial judge is under an obligation to respond and is not, in responding, bound by the standard instructions. Here, the Trial Court failed to give any instructions or assistance to the jury which evidenced confusion and indecision by its unanswered request.

United States v. Wasson, 508 F.2d 1214 (5th Cir. 1978) recognizes plainly that the existence of prejudice turns upon the facts of each case. *Wasson* sets out the test to be used as follows at page 1222:

> Whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted. *Tillman v. United States*, 406 F.2d 930,935 (5th Cir. 1969), vacated in part 395 U.S. 830, 89 S. Ct. 2143, 23 L.Ed. 2d 742 (1969).

In applying this test to these facts, a severance should be granted.

In *United States v. Lane*, 584 F.2d 60 (5th Cir. 1978) the Court squarely faced the problem presented by a joint trial where evidence comes before the jury that would have been inadmissible in each separate trial. In *Lane*, a conspiracy count was dismissed as a result of insufficient evidence, leaving before the jury separate offenses, which, by themselves could not have been initially joined thus resulting in evidence coming before the jury that would have been inadmissible in each separate trial. This exact factual setting exists in the instant case where all of the testimony and argument about the Cocaine Conspiracy and the co-defendant's prior criminal record would not have been admissible at a separate trial. The joint trial in *Lane* also presented the transference of guilt inherent in an entrapment defense.

In reviewing the conviction in *Lane* the Court stated that "the cumulation of similar evidence of each defendant's alleged narcotics transactions and connections *may* have tipped the scales in the Government's favor." See *Lane* at 66.

The compelling prejudice resulting from the transference of guilt and the improper spillover tipped the scales in favor of the Government in the unique fact situation presented by this case. In refusing to grant Mr. Cawthon a separate trial, the Trial Court here abused its discretion in dealing with the common issues presented in this uncommon case.

Mr. Cawthon acknowledges that normally, "evidence of prior criminal offenses relating only to one defendant does not generate prejudice arising to the level that requires severance." *United States v. Salomon*, 609 F.2d 1172; *United States v. Davis*, 546 F.2d 617 (5th Cir. 1977), and further understands that Schindler's reliance on a theory of entrapment does not of itself justify reversing the district court's denial of the severance motion. *United States v. Salomon, supra*. However, Mr. Cawthon urges that Schindler's entrapment defense as well as

the evidence of Schindler's involvement in the cocaine deal and his past felony conviction mandated the grant of his severance motion.

It is clear by the antagonistic and irreconcilable defenses offered at trial that Mr. Cawthon has met the standard as set out in *United States v. Mota*, 598 F.2d 995 (5th Cir. 1979), requiring separate trials. In view of the fact that the trial court was unable to protect Mr. Cawthon from the "spilling over" of evidence from his co-defendant, which resulted in compelling prejudice against him, a new trial is required to afford Mr. Cawthon a fair trial in this cause.

CONCLUSION

Because of the disparate positions of the co-defendants here, the unique nature of the transference of guilt generated by the co-defendant's entrapment defense, the prejudicial spillover effect of the evidence of the unrelated Cocaine Conspiracy and the evil engendered by the evidence of the co-defendant's prior criminal experience and lifestyle, the scales were tipped in the Government's favor; therefore, Mr. Cawthon should have been granted a separate trial. The Petitioner therefore respectfully moves this Court to grant the Petition for Writ of Certiorari and to require briefs on the merits and oral argument in this cause.

Respectfully submitted,

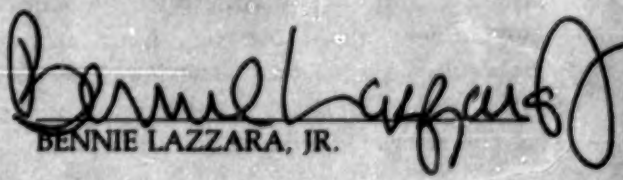
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI has been furnished to the Office of the United States Attorney, 500 Zack Street, 4th Floor, Tampa, Florida 33602, by United States Mail this 9th day of September, 1982.



BENNIE LAZZARA, JR.